IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 78-1865

DONALD LEE MCCABE, D.O., *Petitioner*

v.

GALE GREENBERG, *Respondent*

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Edward B. Joseph
Fredric L. Goldfein
Attorneys for Petitioner

Of Counsel:
KALINER AND JOSEPH
1600 Two Penn Center Plaza
Philadelphia, PA 19102
(215) 564-4190

THE LEGAL INTELLIGENCER, 66 NORTH JUNIPER STREET, PHILA., PA. 19107 (215) 561-4050

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TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Now comes the Petitioner, DONALD LEE McCABE, D.O., and files this reply to Brief in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

I. The Jury Interrogatory as a Procedural Device Modifying the Substantive Outcome of the Case.

Petitioner is well aware that the Rules Enabling Act empowers only this Court to promulgate rules. Petitioner has never contended that the court below promulgated rules. In fact, Petitioner specifically refers to this rule as one "properly enacted by this Court." (Petition for Writ of Certiorari at 15). However, in an attempt to avoid Petitioner's entire argument on this use of a jury interrogatory as an *Erie* violation and as a threat to the relationship between federal and state court jurisdiction, Respondent characterizes the Rules Enabling Act analysis as "window-dressing" and "surplusage." Rather than responding to the substantive aspects of Petitioner's argument, Respondent chooses to make an overly-technical semantic response to the Petitioner's introductory argument. In so doing, Respondent overlooks not only the Rules Enabling Act argument but also the most basic and central argument of Petitioner's reason I for allowing the Writ.

The Rules Enabling Act gives the Supreme Court the power to promulgate rules as long as such rules do not "abridge, enlarge or modify any substantive right."

Logically then, any rule which *does* "abridge, enlarge, or modify any substantive right" is a rule in violation of the Rules Enabling Act.

Similarly, if a rule which is otherwise proper is *used* to "abridge, enlarge or modify any substantive right," that use places the rule in violation of the Act. In using F. R. Civ. P. 49 to modify the substantive outcome of a diversity case, the trial court has given that rule a function totally inconsistent with the directive of the Rules Enabling Act. This Court should re-establish the proper function of procedural rules in diversity cases by granting the Petition for a Writ of Certiorari.

To the *most* central issue, however, the Respondent makes absolutely no response. That issue is a failure of the

trial court to utilize state substantive law in framing the jury interrogatory. Although the Respondent acknowledges that Petitioner has correctly interpreted "*Erie* and its progeny," she makes no response to that *Erie* violation. On the issue of the use of a procedural device to modify the substantive outcome of a diversity case, and the resulting consequences for federal court jurisdiction, Respondent is silent. Respondent's choice to ignore the most important arguments must only mean that Respondent concurs with Petitioner's position.

Petitioner respectfully submits that these issues be therefore considered by this Court as uncontested.

II. The Reference to the Plaintiff's Alleged Mental Condition in the Jury Interrogatory Despite Pennsylvania Law to the Contrary.

Despite Respondent's representation, Petitioner has consistently advocated the position that an alleged mental impairment cannot be considered in determining when the statute of limitations begins to run. At no time did Petitioner ever acquiesce to such condition being considered. In addition, appropriate exceptions were made in the court below by defense counsel (counsel for Petitioner herein). A careful reading of the record supports this position.

Respondent contends that defense counsel stipulated that the impairment to be considered by the jury had been caused by the defendant. However, the record discloses that defense counsel merely agreed that there was no evidence in the record of impaired judgment from other sources.[1] In essence, defense counsel was merely agreeing to a statement in summary as to what was contained in the record. This was in no way a stipulation to the consideration by the jury of mental impairment.

Respondent's allegation that no exception was taken to this jury interrogatory is simply not correct. Chief Judge Lord's original interrogatory on the issue of the statute of

1. MR. BEASLEY: But there is no evidence in this record that her judgment was impaired by anything else, and that would be the defendant's burden.

THE COURT: That is right. There is nothing in the record to show that her judgment was impaired by anything other than this, and that is part of the defendant's burden of proof.

MR. KLUGMAN: Is that a fair statement?

THE COURT: I think it is a fair statement.

MR. KLUGMAN: As to the record I —

MR. JOSEPH: Since he thinks it is a fair statement —

THE COURT: I see.

MR. JOSEPH: — ergo it is a fair statement; that's the end of that.

MR. BEASLEY: Thank you, sir. (R.658a)

limitations made no mention of the alleged mental impairment.[2] Counsel for plaintiff (counsel for Respondent herein) subsequently suggested an interrogatory which referred to plaintiff's alleged mental incapacity.[3] Immediately following the trial court's decision to utilize that interrogatory, defense counsel responded "I would *except* to that, with the indication I think Your Honor's original interrogatory was correct." (R656a—*emphasis supplied*) Clearly, therefor proper exception was taken in the trial court. In fact, F.R.Civ.P. 51, which Respondent utilizes in support of her waiver argument, specifically provides for exceptions to be made outside of the jury's hearing.

Finally, in Respondent's haste to allege that exceptions had been waived, Respondent fails to recognize that Rule 51 applies to instructions to the jury, not jury interrogatories.

Since exception was properly taken in the trial court and preserved on appeal, Respondent's waiver argument is without merit and the issue stands properly before this Court.

2. THE COURT: "Did the plaintiff know or in the exercise of reasonable diligence should she have known before January 5, 1974, that she was suffering harm because of the defendant's conduct?" (R.654a)

3. MR. BEASLEY: "Do you find that a person in Mrs. Greenberg's mental and physical condition—quote or parentheses as you find as a fact it was—would have been able to know or should have known that a harm was caused to her by his treatment." (R.655a)

III. The Unnecessary Prediction of Pennsylvania Law by the United States Court of Appeals for the Third Circuit.

Despite Pennsylvania law, to the contrary, the United States Court of Appeals for the Third Circuit held in *Bayless v. Philadelphia National League Baseball Club*, 579 F.2d 37 (3rd Cir. 1978), that the statute of limitations begins to run when plaintiff knew of the injury and its cause. Petitioner maintains that this was an improper prediction of Pennsylvania law.

Respondent contends that Petitioner accepted the cause requirement in the court of appeals. Once again, a careful review of the proceedings shows that Petitioner only *arguendo* accepted the cause requirement in the court of appeals. (Petition for Rehearing at §II.) This is further supported by the court of appeals' Opinion Sur Denial of the Petition for Rehearing at Footnote 1. (App. C at page 24 to Petition for Writ of Certiorari)

The position of the Petitioner is that the discovery rule provides the plaintiff two years from knowledge of the injury to learn its cause and bring the suit.

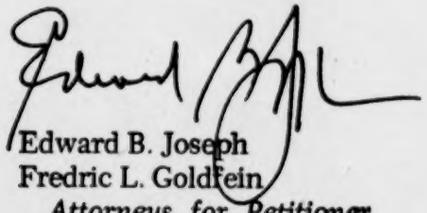
Even the Respondent concedes that the purpose of the discovery rule is to give plaintiff time to institute suit when the cause is not immediately known. (Brief in Opposition to Petition for Writ of Certiorari at p. 5) The legislature has determined that the appropriate time limit is two years. Within these two years, plaintiff must investigate the injury, learn the cause and institute the action. Respondent's reference to the Petitioner as "tormentor *cum* psychiatrist" is not warranted nor is it sufficient to detract from the clear logic of Petitioner's argument.

Finally, Respondent alleges that "Petitioner has cited no Pennsylvania state court case upholding his interpretation of Pennsylvania law." Even a cursory glance at the statute of limitations section of the Petition for Writ of

Certiorari shows that eight Pennsylvania state court cases and four federal court cases were cited in explaining Petitioner's position.

Since there is serious harm to the exercise federal court jurisdiction from unwarranted and improper predictions of state law, Petitioner prays that this Court grant his Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

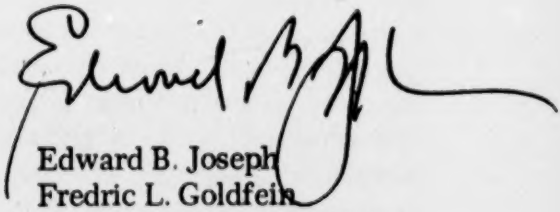


Edward B. Joseph
Fredric L. Goldfein
Attorneys for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of July, 1979, three true and correct copies of the Reply to Brief in Opposition to Petition for a Writ of Certiorari were personally served on James Edwin Beasley, Esquire, 21 S. 12th Street, 5th Floor, Philadelphia. Pa. 19107.

I further certify that all parties required to be served have been served.



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